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607 FOURTEENTH STREET, N.W. · WASHINGTON, D.C. 20005-2011
TELEPHONE: 202 628-6600 · FACSIMILE: 202 434-1690

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BRIAN G. SVOBODA
(202) 434-1654
svobb@perkinscoie.com

January 7, 2000

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Lawrence Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4945

Dear Mr. Noble:

This letter constitutes the response of The Honorable Joseph Baca, the Friends of Joe Baca Committee ("Committee") and William P. Smith, Treasurer (collectively, "Respondents") to the complaint filed by Donald F. McGahn II, who is a political operative for the National Republican Congressional Committee ("NRCC"). Mr. McGahn's partisan complaint should be dismissed.

INTRODUCTION

Mr. Baca was a California state senator at the time he sought to represent California's 42d Congressional District in the United States House of Representatives. Mr. Baca won the November 16, 1999 special election to fill the seat of the late Congressman George Brown.

This complaint revolves around a six-panel, computer-printed, photocopied brochure that had been prepared by Mr. Baca's state senate office at the conclusion of the 1999 legislative session. Entitled "1999 Legislative Wrap-Up," the brochure discussed the status of 19 bills sponsored by Mr. Baca, including some that remained pending before the State Assembly.

Mr. McGahn claims that because several copies of the "1999 Legislative Wrap-Up" were made available on a table alongside Mr. Baca's campaign literature at

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an October 21, 1999 campaign forum which Mr. Baca attended at California State University at San Bernadino, the brochure expressly advocated his election and should have carried a disclaimer under 11 C.F.R. § 110.11. He also claims that Mr. Baca's state office misused official funds for his political gain in preparing the brochure.

Neither of these claims has any legal merit. First, the complaint misinterprets the Commission's disclaimer regulations by misapplying the express advocacy standard, ignoring the fact that the brochure itself contained no solicitation of funds, and failing to acknowledge that Mr. Baca was a state officeholder with a responsibility to communicate about pending legislative matters with his constituents. Second, the false claim that state resources were misused in preparing the brochure is beyond the jurisdiction of the Commission. The complaint should be immediately dismissed.

DISCUSSION

A. The "1999 Legislative Wrap-Up" Required No Disclaimer Under 11 C.F.R. § 110.11.

Because a handful of copies of the "1999 Legislative Wrap-Up" were placed alongside Mr. Baca's campaign brochures at a single public event, Mr. McGahn claims that it was a campaign expenditure subject to Commission regulations which require a disclaimer for communications "that expressly advocate[] the election or defeat of a clearly identified candidate," or "that solicits any contribution . . . through . . . general public political advertising . . ." 11 C.F.R. § 110.11(a)(1) (1999). This claim fails in several respects.

First, the brochure contained no "express advocacy" that would subject it to the disclaimer requirement. The complaint wholly misinterprets the express advocacy standard that § 110.11 incorporates. See FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987). Furgatch involved a newspaper advertisement taken out one week prior to the Presidential general election. *Id.* at 858. The advertisement directly contrasted the two major candidates for President, asserted that the electoral success of one candidate would result in "the country [being] . . . burdened with four more years of

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incoherencies, ineptness and illusion," and concluded with the tag line, "DON'T LET HIM DO IT." Id.

The United States Court of Appeals for the Ninth Circuit held that while an advertisement need not contain certain specific words in order to constitute express advocacy, it must nonetheless "be susceptible of no reasonable interpretation but as an exhortation to vote for or against a specific candidate." Id. at 864. The message of the advertisement must be "unmistakable and unambiguous, suggestive of only one plausible meaning." Id. "If any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements." Id.

When compared against the clear legal standard set forth in Furgatch, Mr. McGahn's complaint collapses. In fact, the "1999 Legislative Wrap-Up" comes nowhere near satisfying the express advocacy standard. There is indeed a "reasonable alternative reading" of the "1999 Legislative Wrap-Up" other than the advocacy of Mr. Baca's election to Congress. The brochure can be read as a state senator's routine effort to inform his constituents of matters before the legislature.

Searching in vain for "an exhortation to vote for . . . a specific candidate", 807 F.2d at 864, Mr McGahn can point only to the phrase, "The future looks promising." Such language makes perfect sense in the context of a senator detailing his legislative accomplishments to his constituents. It makes far less sense in the context of a candidate seeking votes to replace a member of his own political party who had suffered an untimely death. Mr. McGahn's interpretation of the flier not only fails to be the "one plausible meaning" that the Furgatch test requires. Id. It is not even the most logical one.

Second, the brochure contained no solicitation of funds that would otherwise subject it to the disclaimer requirement. The complaint erroneously contends that a disclaimer was required on the "1999 Legislative Round-Up" merely because it was made available at an event at which Mr. Baca supposedly solicited funds, alongside other materials soliciting funds. However, the regulation requires simply that "a communication . . . that solicits any contribution" must contain a disclaimer. 11 C.F.R. § 110.11. The text of the "1999 Legislative Round-Up" contained no solicitation of funds, and thus was not subject to the disclaimer requirement.

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Third, the brochure was clearly a project of Mr. Baca's duties as a state legislator and not of his House campaign. Ironically, it is Mr. McGahn's complaint that provides the best evidence of this fact. Along with the "1999 Legislative Wrap-Up," he enclosed two pieces of bona fide Baca campaign literature that had been distributed at the same table. These two pieces starkly contrast with the "1999 Legislative Wrap-Up." They are professionally produced, they contain Mr. Baca's campaign logo, they carry the applicable disclaimers, and they advocate his election. Plainly, they are campaign materials, while the "1999 Legislative Wrap-Up" is not.

The complaint fails to acknowledge, as the Commission consistently has, that those who seek Federal office often must simultaneously conduct their campaigns while performing official duties. Implicit in the Commission's approach is the realization that while one sometimes acts as a candidate, he is always on duty as an elected official. When he attended the event, Mr. Baca was not simply a candidate for Congress. He was also a member of the California State Senate who represented many of those at the event. Part of Mr. Baca's job was to inform constituents about recent and pending legislation in which he had been involved, and that is exactly what he did.

Despite Mr. McGahn's attempts to obfuscate the matter, the nonapplicability of the disclaimer requirement to the "1999 Legislative Wrap-Up" brochure is clear. The brochure contained no express advocacy, did not solicit funds, and was the product of Mr. Baca's duties as a state legislator. While the one-time placement of the brochure alongside campaign-related material may have created some confusion, which Mr. Baca and his campaign now regrets, it presents no violation of the Act.

B. The Complaint Otherwise Fails to Allege Any Violation of the Act.

In his second claim, Mr. McGahn does not bother to rely on any legal authority whatsoever. Rather, he claims without any evidentiary or legal basis that the "1999 Legislative Wrap-Up" "may have been paid for with impermissible funds."

While false in its premise, the claim that Mr. Baca "was using state taxpayer funds to finance his own career ambitions" is beyond the scope of the Act. Except to prohibit contributions from national banks and corporations chartered by Act of

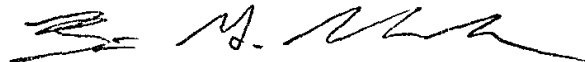
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Congress, see 2 U.S.C. § 441b, the Act does not address the question of whether a governmental entity may contribute in a Federal election.

In fact, Congress excluded the Federal Government from the Act's definition of the word "person." See 2 U.S.C. § 431(11). In so doing, Congress signaled its intent to remove matters such as those raised by Mr. McGahn from the jurisdiction of the Commission, and to leave them within the realm of existing ethics rules. While Mr. McGahn may seek to bring his complaint before some other jurisdiction, it has no place here.

For the foregoing reasons, Respondents respectfully request that the Commission dismiss Mr. McGahn's complaint in all respects.

Very truly yours,

A handwritten signature in dark ink, appearing to read "B. G. Svoboda", written in a cursive style.

Brian G. Svoboda
Counsel to Respondents